Supreme Court, U.S.
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No. 94-560

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

FIRST OPTIONS OF CHICAGO, INC.,

Petitioner,

v.

MANUEL KAPLAN, CAROL KAPLAN AND MK INVESTMENTS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FUTURES ASSOCIATION, CHICAGO BOARD OF TRADE, AND CHICAGO MERCANTILE EXCHANGE IN SUPPORT OF PETITION FOR CERTIORARI

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October 27, 1994

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The Commodity Exchange Act, 7 U.S.C. §§ 1-22 (1994) -- like the Securities Exchange Act of 1934 ("Securities Exchange Act"), 15 U.S.C. §§ 78a-78kk (1994) in connection with the regulation of the securities industry — sets forth a comprehensive system for the federal regulation of the commodity futures industry. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 355 (1982).

The Chicago Board of Trade ("CBOT") and the Chicago Mercantile Exchange ("CME"), which are futures exchanges, and National Futures Association ("NFA"), which is a registered futures association, are self-regulatory organizations ("SROs") authorized under the Commodity Exchange Act to resolve futures-related disputes through arbitration. See 7 U.S.C. § 7a(11) (1994) and 7 U.S.C. § 21(b)(10) (1994). In fact, futures SROs are required by law to arbitrate certain claims. See Geldermann, Inc. v. Commodity Futures Trading Commission, 836 F.2d 310 (7th Cir. 1987), cert. denied, 488 U.S. 816 (1988). Rules promulgated by the CBOT, CME, and NFA must be submitted to the Commodity Futures Trading Commission ("CFTC") for approval pursuant to Sections 5 and 17, respectively, of the Commodity Exchange Act (7 U.S.C. § 7a(12) (1994); 7 U.S.C. § 21(j) (1994)) and must meet the standards set by CFTC Regulations §§ 180.1-180.5 (17 C.F.R. §§180.1-180.5 (1994)).

The arbitration forums offered by the CBOT, CME, and NFA are very similar to the one at the Philadelphia Stock Exchange which was utilized by the parties in this case. The holding in this case could be applied to similar cases brought by parties to CBOT, CME, and NFA arbitrations in any circuit, and

would almost certainly be applied to cases brought in the Third Circuit. Since that holding is detrimental to the effective functioning of the arbitration programs offered by the CBOT, CME, and NFA, these SROs have a substantial interest in having this Court grant First Options of Chicago, Inc.'s Petition for Certiorari.

The parties have consented to the filing of an Amici Curiae Brief by the CBOT, CME, and NFA. Copies of the consent letters from the parties' respective counsels are attached as Appendix A.

II. REASONS FOR GRANTING THE PETITION FOR CERTIORARI

A. Summary of Argument

The CBOT, CME, and NFA are filing this Amici Curiae Brief in support of the Petition for Certiorari filed by Appellant First Options of Chicago, Inc. These arbitration forums submit that the Third Circuit Court of Appeal's decision dated March 31, 1994 incorrectly applied a de novo standard of review in evaluating the arbitrators' determination on the issue of jurisdiction or arbitrability. This is an important question of federal law which should be decided by this Court due to the harmful impact which the Third Circuit's decision would have on the national policy favoring arbitration of commodity futures and securities disputes and on the Congressional policy of industry self-regulation.

B. The Third Circuit's Decision Could Have Far-Reaching Effects on Securities and Commodity Futures Arbitration Proceedings

The Third Circuit Court of Appeal's decision provides that courts may disregard the determinations of arbitrators on the

arbitrability issue even where the parties had submitted the arbitrability issue to the arbitrator for resolution. As a result, arbitrators who have decided issues of jurisdiction or arbitrability face the prospect of expending substantial time and energy in resolving disputes, only to have a court subsequently render those efforts a nullity.

Individuals who have full-time jobs in the legal field or in the securities or futures industry serve as arbitrators under the auspices of securities or commodity futures SROs, with little or no compensation, for the benefit of the industry and the investing public. These arbitrators are regularly called upon to resolve jurisdictional or arbitrability issues, and they devote substantial effort to the resolution of these issues. Arbitrators often resolve jurisdictional issues in favor of arbitrability and thereafter devote substantial time and effort to deciding the merits of a case.

The Third Circuit's decision in this case creates the distinct possibility that the voluntary efforts of these skilled individuals to adjudicate arbitrability issues, which are both procedural and substantive, will be fruitless. This represents a substantial waste of resources and a disincentive to potential arbitrators to serve. That result is contrary to the securities and commodity futures regulatory framework and to the liberal federal policy in favor of arbitration.

The potential waste of resources — including not only the arbitrators' time, but also the efforts of the officials who administer the arbitral process, the attendance of witnesses, the expense of the arbitral facility, and the cost of legal counsel — and the increased difficulty in attracting the most qualified arbitrators could undermine the comprehensive arbitration systems currently in place in the securities and commodity futures industries, with far-reaching consequences.

To demonstrate how extensive the effects of the Third Circuit's decision could be, over the four-year period from 1990 through 1993 the CBOT, CME, and NFA alone received over 1,400 arbitration claims and disposed of over 1,700 cases, as follows:

YEAR	ENTITY	TOTAL CASES RECEIVED	TOTAL CASES CONCLUDED
1990	CBOT	53	53
	CME	95	82
	NFA	278	454
1991	CBOT	50	49
	CME	90	81
	NFA	232	287
1992	CBOT	32	30
	CME	86	100
	NFA	200	303
1993	CBOT	69	44
	CME	60	76
	NFA	191	180
TOTAL		**1,436**	**1,739**

Furthermore, published information on arbitration cases at the seven largest securities industry SROs shows 16,640 cases filed and 17,465 cases concluded during 1990-1992.

Year	Total Cases Received	Total Cases Concluded
American Stock Exchange		
1990	69	72
1991	51	64
1992	45	55
Chicago Board Options Exchange		
1990	67	85
1991	46	62
1992	28	28
Municipal Securities Rulemaking Board		
1990	75	90
1991	94	82
1992	45	68
National Association of Securities Dealers		
1990	3,617	4,019
1991	4,150	4,037
1992	4,379	4,375
New York Stock Exchange		
1990	1,378	1,466
1991	1,403	1,496
1992	873	1,167

Pacific Stock Exchange

1990	93	68
1991	86	82
1992	58	65

Philadelphia Stock Exchange

1990	29	34
1991	33	32
1992	21	18

Total

1990	5,328	5,834
1991	5,863	5,855
1992	5,449	5,776

5 SECURITIES ARBITRATION COMMENTATOR, Sept. 1993, at 9.

Similarly, the American Arbitration Association reports that 577 securities arbitration claims were filed there in 1991, 485 in 1992, and 635 in 1993. This is only a fraction of its overall filings, which totaled 63,171 in 1993. DISPUTE RESOLUTION JOURNAL, June 1994, at 5; ARBITRATION JOURNAL, March 1992, at 4. *All* of these cases, as well as the thousands of other arbitration cases filed in other arbitration forums each year, are potentially affected by the Third Circuit's ruling imposing a de novo standard of review on an arbitrator's determination of arbitrability.

In many of the cases which have been heard at futures, securities, and other arbitration forums, the arbitrators were presented by the parties with the question of whether the dispute

was arbitrable or whether the arbitration forum had jurisdiction over a party. It is unfair and wasteful to allow a party who unsuccessfully raises the issue of arbitrability before the arbitrators and thereafter participates in the entire arbitration proceeding (without seeking judicial relief or expressly reserving the right to do so), to subsequently reassert the arbitrability issue for de novo review by a court. This result is contrary to the national policy favoring arbitration and presents an important question of federal law which should be settled by this Court.

III. CONCLUSION

For all of these reasons, the Chicago Board of Trade, the Chicago Mercantile Exchange, and National Futures Association respectfully ask this Court to grant the Petition for Certiorari filed by First Options of Chicago, Inc.

Respectfully submitted,

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October 24, 1994

Ms. Kathryn Page Camp
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RE: Appeal Docket No. 92-1814
Kaplan vs. First Options of Chicago, Inc.

Dear Kathryn:

First Options of Chicago, Inc., through its attorneys Gardner, Carton & Douglas, hereby consents to the filing of an Amicus Brief by the Chicago Board of Trade, the Chicago Mercantile Exchange and the National Futures Association in connection with the case entitled Kaplan v. First Options of Chicago, Inc., No. 94-560.

Sincerely,

Stephen P. Bedell/sma

Stephen P. Bedell

APPENDIX A-2

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October 19, 1994

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Re: First Options of Chicago, Inc. v. Kaplan, No. 94-560

Dear Mr. Roth:

Manuel Kaplan, Carol Kaplan, and MK Investments, Inc. hereby give their consent to the Chicago Board of Trade, the Chicago Mercantile Exchange, and the National Futures Association to file an amicus brief in connection with Docket No. 94-560 (U.S.).

Sincerely,

Richard A. Koffman

RECEIVED
OCT 21 1994
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